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The Emergence of Art Law

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LEGAL CHANGE MOST OFTEN MIRRORS society's broader social, political, and economic developments.[1] As society becomes more complex the law evolves to meet additional needs, often by becoming more specialized. In recent years the consumer, environmental, and welfare movements, as well as the demands of the poor and disadvantaged for civil and economic rights, have led to changes in the law and to the development of new legal specialties. One area of the law which has most recently become sufficiently particularized to be considered a discrete legal specialty is art law.

By art law we refer to the practices of traditional legal specialties such as commercial law, contracts, copyright, entertainment, international law, labor relations, and tax law as they have evolved to meet the ever more particular needs of the visual artist. Traditionally, a work of art has been treated as any other chattel. As Franklin Feldman and Stephen E. Weil, authors of a leading reference work on visual art law, have noted:

> A generation ago, most of the problems involving art works were resolved by recourse to some generalized body of law. The rules regulating the sale of an etching by Picasso were largely the same as those covering a sack of potatoes by a farmer. A museum might dispose of a painting from its collection with as little question as a hospital selling a used bed.[2]

Today, American law relating to the arts has become more particular, and art law itself has developed into a discrete and increasingly recognized legal field. The Association of American Law Schools, for example, has created a section on art law. The American Law Institute presents yearly seminars in one aspect of art law, "Legal Problems of Museum Operations," which in the past year drew over 200 participants. A small but growing number of attorneys have specialized their practice in this area, and an increasing number of law schools, including Fordham, Harvard, Lewis and Clark, Stanford and Pace, are offering courses on art law. There are two case books on art law presently available and a third is expected in the next few months.[3] *The New York Law Journal*, the daily paper of the New York legal community, publishes a bimonthly column on the topic, and law reviews have begun to present symposia.[4]

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[1] J. HURST, THE GROWTH OF AMERICAN LAW 295-301 (1950); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 584-91 (1973).

[2] S. FELDMAN & S. WEIL, ART WORKS: LAW, POLICY, PRACTICE 5 (1974).

[3] S. FELDMAN and S. WEIL, *supra* note 2; L. DUBOFF, DESKBOOK OF ART LAW (1977). A third casebook, LAW, ETHICS & THE VISUAL ARTS, has been prepared by Professors Albert Elsen and John H. Merryman of Stanford University and will be published by Matthew Bender.

[4] In addition to this symposium, see Elsen, *Introduction: Why Do We Care About Art*, 27 HASTINGS L.J. 951 (1976); *Symposium — Legal Aspects of the International Traffic in Stolen Art*, 4 SYRACUSE J. INT'L & COM. 51 (1976).

It is the purpose of this Article to examine the practical and legal origins of the field of art law, and to highlight principal legal questions which are of significant concern to the visual artist.

I. The Emergence of Art Law as a Discrete Specialty

The major factor in the development of art law has been the art explosion and cultural boom of the past twenty years. In the post-World War Two period, the art and auction markets shifted from Europe to the United States. Concomitant with this economic shift, new currents in art such as the development of abstract expressionism, pop art, and other visual arts movements arose on this side of the Atlantic.[5] New York's pre-eminence as the art market's center led to an increased interest in the arts and to coverage of art by the media. Despite somewhat sanctimonious protests of artists and others, art became in many ways more like other businesses — big business — and the marketing of Andy Warhol's *Campbell Soup Can* and other works became not that much different from the marketing of Campbell's soup. Art became an important commodity followed even by non-collectors, and auctions became chic events followed closely by the press and the public.[6]

A. *The New Collectors*

New patterns of collecting and art appreciation emerged in this period, and the interest of Americans in the arts crossed all cultural, political, social, and economic boundaries. The acceptance of the visual arts into the cultural mainstream is demonstrated in the corporate interest and support of modern art and architecture. In the past decade there has been a tremendous expansion in the number of museums, galleries, and collectors. The expansion of art collecting into the middle class was encouraged by the creation of new collecting art forms such as prints, posters, and photographs.[7] This not only greatly increased the dollar value of the art industry, but widened the possibilities of consumer abuse.[8]

B. *Federal Funding of the Arts*

The intrusion of state and federal governments into the funding of the arts has been another important factor in the development of art law.[9] Governmental funding has been followed closely by governmental regulation, which in turn has had a great effect upon the emergence of legal procedures and regulations in the arts and upon the ways in which arts organizations do

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[5] For an interesting discussion of the art explosion in the United States in the last twenty years, *see* Warshaw, *But Is It Art? The Artist In the Market*, Art & The Law, Feb.-Mar. 1975, at 1.

[6] The 1973 sale at Southeby Park Bernet of Postwar and Contemporary Printings and Sculpture from the Collection of Robert C. Scull brought national media coverage and was made the subject of a movie, America's Pop Collector Robert C. Scull — Contemporary Art at Auction, produced by E. J. Vaughn in 1974.

[7] Warshaw, *supra* note 5, at 3.

[8] *See* notes 30-37 *infra*.

[9] The funding of the National Endowment for the Arts has grown from $2,534,308 in 1966 to $123,500,000 in 1977-1978.

business. Fifty years ago the major responsibility of museum counsel was to insure that elderly patrons had made appropriate bequest provisions to the museum. Now, museum counsel are faced with a variety of legal problems similar to those of other complex institutions which receive federal and state funds.[10]

The infusion of government funding has created a variety of problems and forced reactions to federal regulations. Because of the amount of federal and state support, many museums can no longer be considered private institutions, but have become quasi-public; as a result, the equal protection and due process clauses of the Federal Constitution may be deemed to apply to everything from hiring policies to exhibitions.[11] The governmental presence has forced museums to become aware of a variety of federally required programs for the handicapped,[12] for employment,[13] and for minorities.[14] Trustees and curators have been forced to define their responsibilities, and public officers such as attorneys general are becoming more concerned with the activities of so-called private institutions with self-perpetuating boards.[15] Related to this are demands for accountability of museums to the public. The legal complexities of museum operations have led to the creation of legal offices in many of the larger museums, and to the placement of lawyers in other institutions under less threatening titles such as "administrator."

C. *The Visual Art and the Law*

The artist, too, has been affected economically, politically, and socially by the changing status of the arts. As Robert Warshaw has noted, even more striking than the increase in the number of artists in America and the movement of the art-world center to the United States was the transformation which took place in the artist's socio-economic status. Arshile Gorky, Jackson Pollock, Willem de Kooning, Mark Rothko, and Adolph Gottlieb had all been on the rolls of the WPA's federal art project in the mid-1930's, receiving an average salary of ninety-five dollars per month. During the 1940's Rothko, Gottlieb, Barnett Newman, and Morris Louis were each supported by their working wives.[16]

During the 1960's and 1970's the artist became a cultural hero. Andy Warhol and Jamie Wyeth are members of cafe society. Jasper Johns and

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[10] *See* ALI-ABA, LEGAL ASPECTS OF MUSEUM OPERATIONS (1977).

[11] Malaro, *Conduct of Museums Which May Infringe Constitutional Rights*, in ALI-ABA, LEGAL ASPECTS OF MUSEUM OPERATIONS 367, 370 (1977); Ward, *Sources For and Applicability of Constitutional Limitations on Museum's Freedom of Action*, in ALI-ABA, LEGAL ASPECTS OF MUSEUM OPERATIONS 379 (1977).

[12] Rehabilitation Act of 1973, 29 U.S.C. § 793 (Supp. V 1975).

[13] Equal Employment Opportunities Act, 42 U.S.C. § 2000(e)(1) (Supp. V 1975); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1970).

[14] Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1970); Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. V 1975).

[15] Lefkowitz v. Museum of the American Indian Heye Foundation, No. 41416175 (N.Y. Sup. Ct. 1977). Weintraub, *Museums with Walls: Public Regulation of Deaccessioning and Disposal*, ART & THE LAW, Feb.-Mar. 1975, at 1; H. HESS, THE GRAND ACQUISITORS (1974).

[16] Warshaw, *supra* note 5.

Robert Rauschenberg have lunched with Mrs. Mondale.[17] The American artist is no longer an outcast. He has been incorported into mass society as a creator of consumer goods, with a new-found social status equal to that of a rock star or investment banker.[18]

This new social and economic status has thrust the artist into a business environment which differs greatly from the almost feudal patron relationships of the past and the "left bank" stereotype of his lifestyle. Artists were faced with legal problems similar to those of other businessmen. They began to play the role of manufacturer with respect to protecting their work against unauthorized reproduction, and the role of employee with the respect to protecting themselves against exploitation by employers. As business people, they shared the concerns of other affluent Americans in the areas of tax and estate planning.

One lesson for artists from the litigation surrounding the estates of Mark Rothko[19] and David Smith[20] is the need to have competent counsel, with experience in representing artists, in drafting one's will. The tax consequences to the artist's estate and to his art work, as well as the liabilities of his executors, are of such magnitude that casual estate planning is an invitation to litigation. Like investment bankers and rock stars, successful artists will increasingly be surrounded by a specialized coterie of attorneys, accountants, and agents.

Not every visual artist, of course, has shared in this cultural boom. The number of individuals who call themselves "artists" is staggering; each year the American art educational system alone graduates 30,000 individuals who can call themselves artists.[21] The vast majority of artists have not harvested the commercial rewards of the art boom. However, they have coalesced and like other disadvantaged groups begun to make demands for recognition of artists' rights.

II. The Origins of Specialized Treatment of Artists and Works of Art

A. *Early Customs Court Definitions of Art*

The courts and legislatures have just begun to realize that the arts require special legal treatment, but officials of the Customs Court have been aware of the legal problems unique to art work since the nineteenth century. The court has had a particularly difficult time in defining what is "art," with the result that some fine art works have long received lower import duties than other items.[22]

The court first employed a representational test, which was a most restrictive definition of "art" for legal purposes. As a result of the representational test, the term "art" as defined by the tariff act did not cover the entire

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[17] *See Arts and Taxes on the Menu of Mrs. Mondale's Luncheon*, N.Y. Times, June 2, 1977, at 16, col. 3.

[18] Warshaw, *supra* note 5.

[19] *In re* Rothko, 71 Misc. 2d 74, 335 N.Y.S.2d 666 (Sup. Ct. 1972).

[20] Estate of David Smith, 57 T.C. 650 (1972).

[21] Hughes, *A Modest Proposal: Royalties for Artists*, Time, Mar. 11, 1974, at 65.

[22] *See generally* L. DuBoff, *supra* note 3; Tariff Act of 1883, ch. 22, Stat. 513.

range of the beautiful and artistic, but only those artistic productions which could be characterized as "something more than ornamental or decorative [and] which may be properly ranked as examples of the free fine arts, or possibly that class only of the free fine arts imitative of natural objects as the artist sees them and appealing to the emotions through the eye alone."[23]

In a legal context this meant that a dreary portrait of a government official was art, while a cubist painting by Picasso was not. As such, the representational test was an arbitrary and overly restrictive definition which took no cognizance of currents of modern art. It was finally superseded in *Bancusi v. United States*.[24]

In 1926 Edward Steichen, the photographer, purchased *Bird in Space* from Constantine Brancusi in France, and brought the work to the United States.[25] The sculpture was invoiced as a bronze bird, a work of art, and assumed by Steichen to be free of duty. The customs officials who greeted *Bird in Space* considered the sculpture as an object of manufactured metal, and therefore taxable at forty percent of its value.[26] The Customs Court, however, gave legal recognition to nonrepresentational forms of art, and held that *Bird in Space* was entitled to free entry.

The significance of *Brancusi* for the development of art law was the judicial recognition that the standards relating to works of art must include special criteria which reflect the unique nature of the subject matter. The *Brancusi* court recognized that the statutory definitions in the tariff act had to bend to meet artistic developments.[27] Nonetheless, the courts continued to struggle with distinctions between art and non-art[28] until the 1958 amendments to the tariff art[29] removed substantially all barriers to the free entry of modern and abstract art works in modern and abstract media and styles.

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[23] United States v. Olivetti & Co., 7 Ct. Cust. App. 46, 48-49 (1916). The court noted that a marble font and two marble seats, although admittedly beautiful, were not art within the meaning of the Tariff Act since they were not representations of a natural object.

[24] T.D. 43063, 54 TREAS. DEC. 428 (1928).

[25] The case is described in L. ADAMS, ART ON TRIAL 37 (1976).

[26] Tariff Act of 1922, ch. 356, 42 Stat. 858.

[27] The court in *Brancusi* noted that:

> There has been developing a so-called new school of art, whose exponents attempt to portray abstract ideas rather than to imitate natural objects. Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be considered.

Brancusi v. United States, T.D. 43063, 54 TREAS. DEC. 428, 430-31 (1928).

[28] L. DUBOFF, *supra* note 3, at 20. Customs courts have still not recognized the artistic merit of crafts or articles which may have a primarily utilitarian purpose, or which may be the product of an artisan. L. DUBOFF, *supra* note 3, at 24. *See* Mayer v. United States, 18 C.C.P.A. 117 (1930) (imported antique diamond created by artisan rather than artist subject to duty); H.W. St. John & Co v. United States, 65 Cust. Ct. 577 (1970) (stones imported for incorporation into columns used to support church roof not works of art). Antiques are classified as objects of the fine arts even though they may have a utilitarian purpose or were created by artisans. 19 U.S.C. § 776.20 (1970). Nor have reproductions and copies fared very well. For sculptures only limited editions of ten or less are entitled to free entry. 19 U.S.C. § 1201 (1970). Art works imported for commercial use are ineligible for duty free entry. L. DUBOFF, *supra* note 3, at 58; Whitman Publishing Co. v. United States, 6 Cust. Ct. 65 (1941) (water color paintings conceived by British artists for reproduction in children's book charged 15 percent duty). *See generally* Derenberg & Baum, *Congress Rehabilitates Modern Art*, 34 N.Y.U. L. REV. 1229 (1959).

[29] Tariff Act of 1959, Pub. L. No. 86-262, 73 Stat. 549.

B. *The Legislative Response to Art*

Art law developed as the courts and legislators took cognizance that the unique nature of the arts required special legislative and judicial treatment. Existing regulations, practices, and statutes did not always protect the artist or the collecting public from the customary ways of doing business in the art world. New techniques in the reproduction of art, as well as the increase in the number of collectors, led New York, California, and one or two other states to redefine the property rights related to the reproduction of works of fine art.

The Uniform Commercial Code deals generally with tangible personal property, rather than with the significant intangible rights emanating from art objects.[30] While some have argued that the Uniform Commercial Code can be utilized to solve the problems relating to the sale and warranty of art works,[31] others have felt that the Code protection was insufficient.[32] The legislatures of New York and California have sought to protect purchasers of art works through legislation making falsification of a certificate of authenticity of a work of art a class A misdemeanor.[33] Dealers who furnish a written instrument describing or identifying an art object with any author or authorship are presumed under these statutes to have included that description as part of the basis of the bargain, and to have created an express warranty with respect to the authenticity of such authorship as of the date of exchange. Disclaimers of warranty are limited to void unreasonable results if the work is proven to be a counterfeit, if the work is unqualifiedly stated to be the work of a named artist, and if it is found that as of the date of sale or exchange such statement was false, misleading, or erroneous.[34]

California and Illinois have pioneered legislation requiring elaborate disclosure of all informational details surrounding the sale of an edition of "original prints."[35] In 1975, New York passed legislation prohibiting deceptive acts in the sale of fine prints and posters.[36] One commentator has criticized the overlegislation in this area because of legislators' impressions that for any arguable abuse, a separate law is necessary to protect the consumer.[37]

The proliferation and perfection of modern techniques in printing and reproduction, however, may also make it easier for the unscrupulous to defraud untrained and unsophisticated purchasers. This feeling accounts for the current explosion in legislation protecting the collector, since the statutes aim to increase the information given to and understood by purchasers of fine arts.

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[30] S. FELDMAN & S. WEIL, *supra* note 2, at 287.

[31] Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409 (1972).

[32] Feldman, *New Protection for the Art Collector — Warranties, Opinions and Disclaimers*, 23 REC. 661 (1968).

[33] N.Y. GEN. BUS. LAW § 219-i (McKinney Supp. 1976).

[34] *Id.* § 219-d.

[35] CAL. CIV. CODE §§ 1740-1744 (West 1973); ILL. ANN. STAT. ch. 121 1/2, §§ 361-367 (Smith-Hart Supp. 1977).

[36] N.Y. GEN. BUS. LAW art. 12-H (McKinney Supp. 1976).

[37] Koegal, *Recent Legislation*, N.Y.L.J., May 18, 1977, at 1. In the 1977 session of the New York State Legislature eight bills relating to the visual arts were introduced.

C. *The Response of the Legal Profession: Volunteer Lawyers for the Arts*

Volunteer Lawyers for the Arts (VLA) began in New York in 1969 when four young lawyers assisted a few artist friends. It has grown to a program which provides legal assistance to over 500 different artists and arts organizations in New York City alone. The VLA concept, which provides free legal representation by volunteer attorneys for individual artists and not-for-profit arts organizations that are unable to afford private counsel and have arts-related legal problems, has spread to nearly a dozen states. There are now VLA programs in many regions and cities, including Albany, Boston, Buffalo, Chicago, Cleveland, Dallas, Los Angeles, Poughkeepsie, Philadelphia, Rochester, San Francisco, Washington, D.C., and the states of Iowa, New Jersey, Connecticut, and Oregon.[38]

The Volunteer Lawyers for the Arts movement has influenced the development of new trends in representation, focused upon the legal needs of creative people.[39] As in other areas of public interest law, once the beneficiaries of legal resources began to demand their legal rights the law became increasingly responsive to their demands.

III. THE ARTIST AND HIS WORK

A. *Artist-Dealer Relationships*

Works of art are generally sold in the United States on consignment, and most artists consign their works to a dealer.[40] Section 2-326 of the Uniform Commercial Code, however, provides that consigned goods are subject to the claims of the dealer's creditors unless: there is a sign-posting procedure, which generally is not done; it is established that the dealer is known by his creditors to be substantially engaged in selling the goods of others; and the required financing statement has been filed, which presents a substantial practical problem.[41]

Unfortunately, many galleries experience financial difficulties within a short time after opening, and are forced to declare bankruptcy. The artist is most often in the position of a general creditor in the bankruptcy proceedings, and may not be able to recover his paintings. In response to the resulting hardship, statutes have been passed in New York and a few other states which exempt the consignor-consignee relation of the artist and dealer from the application of Section 2-326. These statutes, which clarify the inherently fiduciary character of the artist-dealer relationship and lay the legal foundation for the application of criminal sanctions, establish that the artist is to be considered a principal and the dealer his agent.[42]

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[38] [1976] VOLUNTEER LAWYERS FOR THE ARTS ANN. REP. 6-7.

[39] S. FELDMAN & S. WEIL, *supra* note 2.

[40] *Id.* at 495.

[41] U.C.C. § 2-326(3).

[42] N.Y. GEN. BUS. LAW art. 12-C (McKinney 1975). An equivalent California statute took effect on Jan. 1, 1976. CAL. CIV. CODE § 1738 (West 1976).

B. *Artists' Housing*

Sufficient studio space and adequate housing accommodations are among the most pressing concerns of artists today. Often preferring an urban environment in which adequate housing is scarce and expensive, artists have turned to renting commercial facilities for joint living and working space,[43] often in violation of zoning laws relating to the use of commercial property for residential purposes. New York has provided for the special needs of artists, and at the same time restored a declining area of New York City, by amending the Multiple Dwelling Law[44] to permit joint living and working space in the Soho area.[45] The revitalized artistic community which has resulted from this move suggests that similar projects may be profitably instituted in other cities.

C. *Artists' Reserved Rights*

The rallying cry for the artists' rights movement has been "artists' reserved rights" — a demand by artists that they should have a reserved right in their artwork after its initial sale, and should receive a royalty should the work increase in value upon resale by the original purchaser.

In the United States most artists are compensated for their work through a fee minus a dealer commission of thirty to fifty percent. Unless contractually agreed otherwise, the artist will not receive any financial benefit should the artwork greatly increase in value. The artists' reserved right, or *droit de suite* is not a new idea. Such legislation exists in Belgium, Czechoslovakia, France, Germany, Italy, Norway, Portugal, Tunisia, and Uruguay.[46] In January, 1977, California became the first American jurisdiction to enact the *droit de suite*, mandating that artists are to receive a royalty upon the resale of their work.[47]

The demands for an American equivalent to the *droit de suite* can be traced to the 1940's, but the greatest impetus came from the Scull sale at Sotheby Parke Bernet in 1973.[48] Robert Rauschenberg's "Thaw," sold to collector Robert Scull for $900 in 1958, was subsequently resold for $85,000 at

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[43] VOLUNTEER LAWYERS FOR THE ARTS, HOUSING FOR ARTISTS: THE NEW YORK EXPERIENCE 1 (1976).

[44] N.Y. MULT. DWELL. LAW §§ 276-278 (McKinney 1971).

[45] VOLUNTEER LAWYERS FOR THE ARTS, HOUSING FOR ARTISTS: THE NEW YORK EXPERIENCE 14-33 (1976). While the recycling of commercial buildings into residential buildings was initially for artists alone, legislation in 1976 expanded the areas in which such conversions could take place and permitted non-artists to reside in lofts. *Id.* at B-6(a).

[46] Hochfield, *Artist Rights: Pros and Cons*, Art News, May, 1975, at 23. In Europe, legislation pertaining to artists' reserved rights differs with respect to the resales covered, the percentage of the resale price that the artist obtains, the minimum price before which the reserved right mechanism is brought into play, and the length of time during which it operates. Price & Price, *Rights of Artists: The Case of the Droit de Suite*, 31 ART J. 144 (1971). *See generally* Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L. J. 1333 (1968).

[47] CAL. CIV. CODE § 986 (West 1977).

[48] In 1940 the artist Grant Wood, angered that his painting *Daughters of Revolution* had trebled in value within a few years, announced that a new work, *Parson Weems Fable* would be sold with the stipulation that subsequent sales would bring him fifty percent of the appreciated value. Hochfield, *Artists Rights: Pros and Cons*, Art News, May, 1975, at 20. It is not known whether Wood carried through with his threat.

a profit of 9,333 percent. Rauschenberg confronted Scull at the auction, and later told the Wall Street Journal, "[f]rom now on, I want a royalty on the resale and I am going to get it."[49]

Previously, in 1971, a New York lawyer, Robert Projansky, and a Soho dealer, Seth Siegelaub, developed "The Artist's Reserved Rights Transfer and Sale Agreement,"[50] which was an attempt to accomplish contractually much of what the California legislation has more recently attempted to provide. The Projansky Agreement, as it came to be called, was a contract designed to give the artist fifteen percent of any increase in the value of his work each time it was transferred, facilitated by the inclusion of a record of who owned the work at any given time. Not surprisingly, collectors were reluctant to sign the Projansky Agreement, and almost none were willing to execute the contract as written.

A few years later another New York attorney, Charles Jurrist, developed a contract based loosely on the Projansky Agreement. It was simpler and more practicable, and achieved many of the results to which the Projansky contract was addressed. The Jurrist contract sought a more modest package of rights for the artist, and provided safeguards for the collector in an effort to make the contract more palatable to him. Unlike the Projansky contract, the Jurrist agreement sought to obtain a fifteen percent royalty for the artist only on the first resale of the work. This eliminated the very complicated system of ongoing contracts and did not unduly restrict transferability.

Under the Projansky agreement the collector could only sell to a purchaser who himself would enter into a Projansky agreement with the artist. Despite its less restrictive provisions, the Jurrist agreement was no more successful in this respect. Most artists who tried to use the agreements had to forego sales or take out the reserved rights clause, though some of the other goals relating to care and exhibition rights were often achieved. The problem with both contractual arrangements was that they did not reflect the power realitites of the art world. The economics of the art marketplace are such that only those artists who can make their own market, like Robert Rauschenberg, can use such contracts successfully.

The California Resale Royalties Act provides for a five percent royalty of the gross resale price when the work has a fair market value of at least $1,000, is sold at a profit, and either the seller of the work resides in or the sale takes place in California. The royalty cannot be transferred, and can only be

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[49] Ricklefs, *Artists Decide They Should Share Profits on Resale of Paintings*, Wall. St. J. Feb. 11, 1974, at 1, col. 4.

[50] Under the contract, the artist received a guarantee that the work would remain unaltered by the owner. The artist had the right to be notified if the work were to be exhibited, the right to show the work for two months every five years at no cost to the owner, the right to be consulted if restoration became necessary, one half of any rental income paid for the work, and all reproduction rights. Benefits from the appreciated resale value would accrue to the owner for his lifetime plus the life of his surviving spouse plus twenty-one years. If the owner died, the heirs would pay 15 percent of the difference between the fair market value of the work at the time of the transfer to them and the price paid for it by the deceased, assuming the current market value was greater. If the work was destroyed by fire, the artist would receive 15 percent of the insurance.

waived by a written agreement providing for a royalty in excess of five percent of the gross resale price.[51]

It is the responsibility of the seller or his agent to locate and pay the artist,[52] and if the artist is not located and paid within ninety days the resale royalty is to be transferred to the California Arts Council, which is to place the funds in an escrow account and attempt to locate the artist.[53] If the artist is not found within seven years, the money is to be transferred to the Council's operating fund.[54]

If the seller or his agent fails to pay the royalty, the artist may bring an action for damages against the seller within three years after the date of the sale or one year after the discovery of the resale, whichever is later.[55] The statute does not apply to the initial sale or to resale after the death of the artist. Nor does it apply to resale where the gross sales price is less than the purchase price paid by the seller. The statute only applies to fine arts — original paintings, works of sculpture, or drawings[56] — and thus prints and works produced by other multiple reproduction techniques are not included.

The statute has been upheld by a California district court.[57] Congressman Henry A. Waxman has introduced a bill to establish resale royalties on a federal level.[58] Federal legislation is the only promising approach to a success. The problem with all artists' reserved rights legislation is that it tends to help only those that can help themselves, and fails to benefit the overwhelming number of poor artists for whom a resale market is a dream which appears only after the more pressing need of selling to any purchaser is achieved. Nonetheless, reserved rights legislation has served a useful role in rallying artists to general questions relating to artists' rights.

D. Droit Moral

Until 1977 American law had not recognized that artists might have a moral or personal right in their work which transcended or outlasted their ownership right. The *droit moral*, or moral right of the artist, is a concept in French and European law which legally recognizes that a "moral right" or integrity remains to the creator of the work even after the work is sold. In the law of France and other Western European countries, artistic rights involve not only a property right and copyright, but a second element — a moral or nonproperty attribute of intellectual and moral character which gives legal expression to an intimate bond existing between an artistic work and the author.[59] The moral right of the author is considered a right of personalty as

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[51] CAL. CIV. CODE § 986(a) (West 1977).

[52] *Id.* § 986(a)(2)(4).

[53] *Id.* § 986(a)(2)(5).

[54] *Id.* § 986(a)(5).

[55] *Id.* § 986(a)(3).

[56] *Id.* § 986(c)(2).

[57] Morseburg v. Balyon, No. CV24-7210RMT (C.D. Cal. March 23, 1978).

[58] H.R. 11403 95th Cong., 2nd Sess. (1978).

[59] Sarraute, *Current Theory of the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

opposed to a property right.[60] This ongoing non-economic right or interest remains even after the artist has sold the work and no longer retains possession or ownership of the specific object.[61]

There has as yet been no judicial recognition of the artist's moral right in the United States. If the owner of an important sculpture by Mark diSuvero should go mad, pull out his blow torch, and melt his diSuvero into a nondescript lump, there is little that anyone could do. Absent a specific clause in the contract of sale, diSuvero would be powerless.[62]

One of the few attempts to obtain judicial recognition of the *droit moral* failed.[63] In *Crimi v. Rutgers Presbyterian Church*, Alfred D. Crimi had been commissioned to create a fresco in a church. After completion some of the parishioners objected to the mural, feeling that Crimi's portrayal of Christ with so much of his chest bare placed more emphasis on his physical attributes than his spiritual qualities. In 1947, eight years after its completion, the mural was painted over. Crimi brought suit to compel the congregation to have the frescoes restored or removed and to pay damages. The court held that no rights, moral or otherwise, were reserved to the artist, and that if the artist had wanted to reserve such rights, he would have to do so by contract.[64]

In 1977, the first legislative recognition of the artist's moral right occurred under the California Art and Public Buildings Act, a "percent for art statute" which requires the state architect in consultation with the California Arts Council to purchase commissioned works of art for placement in state buildings.[65] The statute specifically requires the state architect to respect the moral rights of every artist whose work is purchased or commissioned. The state architect must "insure that every work of art . . . is properly maintained and is not artistically altered in any manner without the consent of the artist."[66] *The artist retains the following intangible rights:*

(1) the right to claim authorship of the work of art.

(2) the right to reproduce such works of art including all rights to which the work of art may be subject under copyright laws.

(3) if provided by written contract, the right to receive a specified percentage of the proceeds if the work of art is subsequently sold by the state to a third party. . . .[67]

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[60] Merrymen, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L. J. 1023, 1025 (1976).

[61] Professor Merryman has termed the *droit moral* a composite right which includes: the right to respect a work of art, that is, the right of integrity which consists of the right to respect the work of art as it was created by the artist; the right of paternity, which is the right of the artist to insist that his work be associated with his name; and the right of divulgation, that is, the artist's right to withhold his work which relates to the artist's absolute right to decide when a work of art is complete and when to show it to the public. *Id.* at 1027.

[62] The result might be different if the work was located in a museum and the destruction was attempted by the museum. A museum has a different relationship to the public and is regulated by the state attorney general. For instance, N.Y. EDUC. LAW § 264 (McKinney 1976) makes vandalism of art works in museums a criminal act. Di Suvero might have a tort remedy if the mad collector attempted to resell or exhibit the work. *See* S. FELDMAN & S. WEIL, *supra* note 2, at 15-17.

[63] Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

[64] *Id.* at 576-77, 89 N.Y.S.2d at 819.

[65] CAL. GOV'T CODE § 15813 (West 1977). *See* Sandison, *California Enact Droit Moral and Droit de Suite*, ART & THE LAW, Mar.-Apr. 1977, at 3.

[66] CAL. GOV'T CODE § 15813.3(e) (West 1977).

[67] *Id*, § 15813.5(a).

These rights can be extended to the artist's heirs by written contract for twenty years following the artist's death.[68] In what one commentator has referred to as the first appearance of a *Miranda*[69] rule for artists' rights the artist must be informed "in writing of all the rights specified which may be granted to the artist or to the artist's heirs."[70]

Though new to American jurisprudence, the California statute may serve as a prelude to similar legislation on the federal and state levels, as evidenced by the *droit moral* bill recently introduced by Congressman Drinan in the House of Representatives as an amendment to the Copyright Act.[71]

E. Copyright and the Visual Artist

Visual artists have generally been reluctant to avail themselves of copyright protection for their work. Many artists feel that the copyright notice is an intrusion upon their artistic statement, a defacement of their work, and an excessive capitulation to the marketplace.[72] Of more economic significance is that many dealers and collectors are reluctant to purchase works of art bearing a copyright notice.[73]

The consequences of the failure to copyright artworks can be disastrous to the artist. Millions of dollars were made on Robert Indiana's design of *LOVE*, but the artist received not one cent from commercial exploitation due to his failure to copyright the work.[74]

Aside from artistic reluctance to utilize the copyright notice, copyright principles are not fundamentally applicable to the visual arts for they are based upon usage for multiples. The value of a work of art is in its singularity, while the value of a song or a book is that it is created to be reproduced. Unlike most books, musical works, motion pictures, sound recordings, and dramatic, pantomime, and choreographic works, the initial value of a work of art usually inures in the master work or original, rather than in its reproductive potential.[75] For monumental sculptures, the original is the final commercial outlet for exploiting the artistic notion. For other classes of copyrightable subject matter, the economic motivation for creating the work is eventual repetition or reproduction, and not merely a single sale of a single copy of the underlying work.[76]

The visual artist has done fairly well under the Copyright Act of 1976, which for the first time at least implicitly recognizes the distinction between

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[68] *Id.* § 15813.5(b).

[69] Miranda v. Arizona, 384 U.S. 436 (1966).

[70] Sandison, *supra* note 65, at 4; CAL. GOV'T CODE § 15813.5(c) (West 1977).

[71] H.R. 8261 95th Cong., 1st Sess. (1977).

[72] Brenner, *A Two-Phase Approach to Copyrighting the Fine Arts*, 24 BULL. COPYRIGHT SOC'Y 85, 102 (1976). In most European countries there is no notice requirement.

[73] In a survey to determine why visual artists did not use the statutory copyright, the researcher questioned 45 gallery owners; 57.7% of the galleries surveyed felt that the copyright notice defaced an art work, and that the uniqueness of the show would be diluted by the suggestion implied by the notice that the works were not necessarily one of a kind. Sheehan, *Why Don't Fine Artists Use Statutory Copyright?*, 22 BULL. COPYRIGHT SOC'Y 242, 257 (1975).

[74] Indiana now regularly copyrights his work.

[75] Brenner, *supra* note 72, at 86.

[76] *Id.* at 87.

works of fine art and other subjects of copyright, and provides an escape valve from the copyright notice.[77] Under Section 101, the term "copies" includes the original or master in which the work is first affixed. Thus, in the context of the copyright law an original work of art comes under the definition of "copies." However, a sale of original or a small number of copies to the public without notice does not invalidate the copyrights of such works,[78] and the copyright owner need not take any corrective action to validate the copyright involved.[79]

The sale of an original graphic or sculptural work without copyright notice will not automatically divest the artist of his copyright. The duty to affix notice will arise when the work of art becomes a source for reproduction.[80] Thus, the duty to affix notice will arise from multiple run reproductions, but not for very limited editions of "relatively small" number. Under Section 405(a)(2) the artist must register the work within five years after publication without notice. The artist must then make a "reasonable effort" to add the notice to all copies which have been distributed to the public after the omission has been discovered.

For the artist who does place a copyright notice on his work, the requirements are stricter. Under prior law, the absence of the year of date of first publication in a copyright notice was acceptable.[81] The new Act provides that the date must be present in the copyright notice if one is used.

Under proposed regulations recently published by the Registrar, there is no longer any excuse for artists not to use the copyright notice. Notice may be placed directly or by means of a label that is cemented, sewn or otherwise properly secured, or it can be placed on the backing, mounting, framing, or other material to which the work is attached. For three-dimensional works, notice can be placed directly on or by means of a label cemented, sewn or otherwise permanently secured to any visible portion of the three-dimensional work or to any base, mounting, framing or other material to which the work is attached. If the work is of a physical nature that does not lend itself to the notice being written directly on the work or written on a label, the notice may appear on a durable tag attached to the copy with sufficient permanency that it will remain with the copy during the entire time of the work.[82]

Other sections of the copyright revision recognize certain problems and needs of the visual arts. For the first time in history, applied arts and works of artistic craftsmanship are given statutory recognition as the subject matter of copyright.[83] The originality requirement could cause a problem for artists.

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[77] *See generally* Gottlieb & Nolen, *Pictorial, Graphic and Sculptural Works Under the New Act*, in 1 PLI, CURRENT DEVELOPMENTS IN COPYRIGHT LAW 501 (1977) [hereinafter cited as Gottlieb & Nolan].

[78] Copyright Act of 1976, 17 U.S.C.A. § 405(a)(1) (West Supp. 1977).

[79] Gottlieb & Nolan, *supra* note 77, at 512; H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 147 (1976) [hereinafter cited HOUSE REPORT].

[80] Brenner, *supra* note 72, at 113.

[81] Gottlieb & Nolan, *supra* note 77, at 511; 17 U.S.C. § 19 (1970); Fleischer Studios Inc. v. Ralph A. Freundlich Inc., 73 F.2d 726 (2d Cir. 1934).

[82] 42 Fed. Reg. 64374 (1977), to be codified in 37 C.F.R. § 201.2(i).

[83] *Id.* § 101.

Section 101 makes a distinction between designs that can at least conceptually be identified separately and exist independently from utilitarian aspects of the useful article in which they are embodied, and those designs which cannot. Only the former are copyrightable.[84] The House Report would not allow copyright for shapes of automobiles, airplanes, or food processors.[85] Thus, an artist who took an automobile tire and placed his name on the rim of the tire with a copyright notice and the year of publication — clearly a possibility these days — would probably not be granted copyright protection.

Of special importance is the resolution of the long-time controversy over whether a display of pictorial, graphic, or sculptural works in a gallery exhibition should be considered "publication." The new law specifically states that the public display of a work at a gallery is not a publication.[86]

One area in which visual artists made their presence known concerns the strict depository requirements of two complete copies of the best edition. Each copy of a small edition of a graphic work may have a substantial economic value, and to require artists to deposit two copies imposes a very difficult burden. With the visual artist specifically in mind, the statute provides that the Register of Copyrights may issue regulations to exempt any categories of material from the depository requirement, or to provide alternative forms of deposit.[87] Regulations recently promulgated under this authority permit a deposit of photographs for any work in an edition of no more than 300. Visual artists have also benefitted in that the transfer of ownership of pictorial, graphic, or sculptural work does not convey rights of reproduction in the absence of a written agreement.[88]

Overall, the visual artist's needs have been recognized in the recent revision of the copyright law. From a theoretical perspective, however, original art works do not fit properly into copyright categories, and copyright remains primarily a legal device to protect reproductive rights. One hopes that the subtle recognition in the revision that an original work of art will not lose copyright protection if it does not have the notice affixed will eventually

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[84] Gottlieb & Nolan, *supra* note 77, at 509; HOUSE REPORT, *supra* note 79, at 55, in which it is stated that "unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill."

[85] HOUSE REPORT, *supra* note 79, at 58.

[86] Copyright Act of 1976, 17 U.S.C.A. § 101 (West Supp. 1977); HOUSE REPORT, *supra* note 79, at 63-64.

[87] Copyright Act of 1976, 17 U.S.C.A. § 407(c) (West Supp. 1977). This section also states that:

> [s]uch regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

[88] *Id.* §§ 202, 204(a). These sections overrule Pushman v. New York Graphic Soc'y, Inc., 287 N.Y. 302, 39 N.E.2d 249 (1942). Several states had reached the results codified in sections 202 and 204(a). *See, e.g.*, N.Y. GEN. BUS. LAW § 224 (McKinney 1968); CAL. CIV. CODE § 982(c) (West Supp. 1977).

become an explicit statutory recognition that art works are exempt from the statutory formalities of copyright until such time as the work is to be reproduced.

IV. Less Developed Areas: Federal Taxation

As illustrated in the above discussion of copyright, many areas of law have not yet begun to respond to the particularized needs of the visual artist, and by subsuming the visual arts under more general rules a sometimes uncomfortable fit has been forced. The area of federal income taxation has been problematic for the visual artist because of the failure by Congress and the Internal Revenue Service to recognize special needs of the arts. There are dire consequences to the artist, particularly the poor artist, in the ignoring of these needs.

A. The Home Office Deduction

The tightening of the home office deduction under the Tax Reform Act of 1976 has created real problems for the visual artist.[89] Under the new provisions, a deduction may be taken for the maintenance of a home office if: (i) it is the principal place of business; (ii) it is used exclusively as a place of business by the taxpayer in meeting or dealing with patients, clients, or customers in the normal course of business; (iii) it is used for storage of inventory which the taxpayer sells at retail or wholesale in the normal course of business, but only if the residence is the taxpayer's only fixed place of business; or (iv) if the home office is a separate structure not attached to the dwelling unit in which the taxpayer resides, used exclusively "in connection with" the taxpayer's business, and any portion of the residence is rented to someone else.[90]

Under these new provisions an artist may deduct his or her rent or maintenance allocable to space in the apartment or loft which is *exclusively* used as artists' principal art studio. Unlike the old law, there is no mixed or allocated use of an artist's studio. That is, the artist can no longer use a studio area for both living and working purposes. This means the artist must rigorously delimit space for the exclusive use of his artistic activities.

Congress apparently did not intend to harm the artist through this tightening of the deduction. The Committee Report discussing the provision that a separate structure not attached to the dwelling may be used for the home office deduction cited as the only example of a separate structure "an artist's studio in a structure adjacent to but unattached to his residence."[91] This is of benefit to suburban or rural artists who have converted barns into studios, but does not reflect the urban reality of artists who live and work in large, single-roomed lofts.

Of greater difficulty to the poor artist is that the annual business deduction for the business portion of the residence may not exceed the annual gross

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[89] I.R.C. § 280A.

[90] *Id.*

[91] S. Rep. No. 938, 94th Cong., 2d Sess. 148, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3580.

income from the business minus the non-business deductions — that is, those available without regard to business activity.[92] This means that if an artist sells no paintings in a particular year, he can no longer make use of the home office deduction. One cannot have a loss resulting from the use of a studio.

This has a particularly severe result for the average artist who has an intermittant market. Studio expenses are ongoing, and there may be years when no paintings are sold. Louise Nevelson, for instance, did not sell a single piece of art until she was fifty-six years old, though she presented her first one-woman show at the age of forty-one.[93] In this respect, the home office restriction simply does not take into account the realities of the art market.

B. Artists' Charitable Contributions

The Tax Reform Act of 1969[94] excluded from the definition of capital asset, and therefore from the tax advantages of capital gains treatment, copyright interests and literary, musical, or artistic compositions, as well as letters, memoranda, or similar property when in the hands of the taxpayer whose personal efforts created the property.[95] If an artist donates one of his works to a tax exempt institution, the allowable deduction is computed by reducing the fair market value of the work by the amount of appreciation of such property. Thus, the artist may deduct from adjusted gross income only the cost of materials he utilized to create the work. However, the collector or one who has obtained the work of art from the creator who has contributed the same work to a non-profit institution may treat the work as a capital asset, and therefore deduct a portion of the fair market value of the work from his adjusted gross income.[96]

The result of this change in the tax laws is that artists have substantially reduced their donations to museums. In response, legislation was introduced in 1976 to enable the artist under specified circumstances to deduct from his adjusted gross income seventy-five percent of the fair market value of his work which he contributes to nonprofit institutions.[97] The artist could have deducted in any one year a maximum of $25,000, but the deduction could not exceed the taxpayer's gross income for such year from the sale of art work. The bill died in conference.

Similar bills have been introduced in the current session which would allow the artist to receive a tax credit for the contribution of art works.[98] The Treasury opposes these bills on the ground that artists are providing services in such circumstances which for other groups are generally non-deductible. The Treasury feels that the lost donations will eventually come from artists'

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[92] I.R.C. § 280A(c)(5).

[93] Conroy, *Form and Function*, Washington Post, Feb. 20, 1977, at 1, col. 1.

[94] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of I.R.C.).

[95] I.R.C. § 1221.

[96] *Id.* § 170.

[97] S. 1435, 94th Cong., 1st Sess. (1975). The corresponding House Bill was H.R. 6057.

[98] S. 1384, 95th Cong., 1st Sess. (1977); H.R. 439, 95th Cong., 1st Sess. (1977). The bill would provide a tax credit of 30 percent of the fair market value of contributions to $35,000.

estates, and that there is justification for giving preferred treatment to collectors because they had paid for the works initially.[99]

C. *Estate Tax: Carryover Basis*

The reform of the laws governing estate taxation has, perhaps unintentionally, caused problems for artists' estates. Under prior law, artists' heirs received capital gains treatment for profits received by them from the sale of inherited art works that were in excess of fair market value at the date of death.[100] Under the new law, the heirs are taxed at ordinary rather than capital gains rates on the difference between the original cost of the art work to the decedent and the sale price received by the artist's heirs. This new basis is due to the interplay of section 1221 of the Internal Revenue Code, which excludes from the definition of capital asset an artistic composition by one who created the property,[101] and a new carryover basis rule for property acquired or passing from a decedent, which provides that the inheritor of property will take the same basis in property for determining gain or loss as the decedent had immediately before death, subject to certain adjustments.[102] Because of the carryover, a gain realized by the sale of art work by the artist's estate will be treated as ordinary income.[103]

These and similar problems result in part from a move toward simplification and reform in the system of federal estate taxation, at a time when artists are seeking special assistance in meeting their specialized needs. As in other areas of taxation, the affluent artist can often utilize the tax laws to some benefit; the poor artist cannot.

V. Conclusion

This Article has discussed but a few areas of the law in which special approaches to the specific needs of the arts have been developed, and others, such as federal income taxation, in which these needs have been ignored. Art law is a developing legal specialty. Its parameters are not yet fixed. While in many respects the law and the legal community are not yet fully responsive to the particularized needs of the artist, it is clear that the process of refinement and accomodation of legal thought in this area will continue.

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[99] *Art and Taxes on the Menu at Mrs. Mondale's Luncheon*, N.Y. Times, June 2, 1977, at 16, col. 3.

[100] Gorewitz, *Effect of 1976 Tax Reform Act on Artists' Estate and Gift Taxes*, Art & The Law, Nov.-Dec. 1976, at 5.

[101] I.R.C. § 1221.

[102] I.R.C. § 1023.

[103] Gorewitz, *supra* note 100, at 6.